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## E-Discovery: Why and How E-Mail Is Changing the Way Trials Are Won and Lost

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# E-Discovery: Why and How E-mail Is Changing the Way Trials Are Won and Lost

## I. INTRODUCTION

Since their inception, the discovery provisions of the Federal Rules of Civil Procedure<sup>1</sup> (“Rules”) have treated electronically stored information the same as other traditionally discoverable documents, making no distinctions between files found on a hard drive and those found in a filing cabinet.<sup>2</sup> However, as electronic documents are inherently different from tangible documents, both judges and litigants alike have been struggling to apply the discovery rules to the production of electronic documents. The production of electronic documents throughout the discovery phase of litigation is known as “e-discovery,” and has been an ongoing thorn in the side of the federal judiciary for years.

To solve this problem, the Civil Rules Advisory Committee (“Committee”) drafted a series of amendments (“Amendments”) designed to address the differences between e-discovery and traditional discovery.<sup>3</sup> The Amendments have since been approved by

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1. The Federal Rules of Civil Procedure were promulgated under Title 28 of the United States Code. *See generally* 28 U.S.C., FED. R. CIV. P. (2006). The discovery provisions of the Rules are found within Rules 26 through 53 and cover all procedural aspects of discovery commenced within the federal courts of the United States. 28 U.S.C.A., Rules, Explanation (2006).

2. The Rules were first promulgated in 1938 and did not include practices and procedures for dealing with the disclosure of electronic data during the discovery phase of trial until 2000. CIV. R. ADV. COMM., 109TH CONG., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE C-1 (2005) [hereinafter REPORT]. Even then, the Rules regarding e-discovery were fully understood by the Committee to be “incomplete.” REPORT, at C-20.

3. *Id.* at C-1. The Committee began examining whether the discovery rules could better accommodate the disclosure of electronic data in 2000. *Id.* at C-18. The study consisted of several mini-conferences and one major conference, in which expert opinions from numerous lawyers, academics, judges and litigants were elicited. *Id.* In August of 2004, the Committee published a draft of the proposed Amendments for comment. *Id.* Three hearings were held in 2005 in which experts were given an opportunity to comment on the proposed Amendments. REPORT, *supra* note 2, at C-1. Afterwards, the Amendments were again revised and sent to the Standing Committee for approval. *Id.* at C-18. Upon approval of the Standing Committee, the Amendments were sent to the Judicial Conference Committee for codification. ADVISORY COMMITTEE ON THE FEDERAL RULES OF CIVIL PROCEDURE, SEPTEMBER 2005 SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 21 (2005), *available at* <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> [hereinafter SUMMARY].

both Congress<sup>4</sup> and the United States Supreme Court,<sup>5</sup> and went into effect on December 1, 2006.<sup>6</sup> Because the Amendments make significant modifications to the Rules, attorneys must be aware; not only will such cognizance allow them to take advantage of the strategic benefits that the Amendments may bestow, it will also allow them to conform with the new procedures in order to avoid the imposition of significant monetary sanctions upon their clients.<sup>7</sup>

## II. PROBLEM: ELECTRONIC DOCUMENTATION IS INHERENTLY DIFFERENT FROM PAPER DOCUMENTATION

In 2001, the Committee began to realize that the Rules regarding discovery needed to be reworked, as the differences between electronic documentation and standard paper documentation were causing major problems to parties involved in litigation.<sup>8</sup> Parties were spending hundreds of thousands, if not millions, of dollars to comply with Rules written before electronic data even existed.<sup>9</sup>

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4. SUMMARY, *supra* note 3, at 21-38. The Judicial Conference Committee approved the Amendments in September of 2005. *Id.*

5. On April 12, 2006, the United States Supreme Court adopted the Committee's proposed Amendments. 2006 U.S. ORDER (C.O. 20).

6. "[T]he foregoing Amendments to the Federal Rules of Civil Procedure . . . shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." *Id.*

7. It is important for all legal professionals to have a thorough understanding of the Amendments. As Robert Medved, former clerk for the Honorable Jesse W. Curtis, United States District Court for the Central District of California, stated:

If you are assuming that you need not be concerned with the discovery of electronically stored information or the E-Discovery Rule Amendments since you do not litigate in federal court, or do not represent large clients, or do not represent high-tech clients, or do not litigate big cases, or do not practice intellectual property law, you may want to rethink that assumption.

Robert A. Medved, *E-Discovery and the Proposed Amendments to the Federal Rules of Civil Procedure: A Primer* (June 2006), available at <http://wsba.org/media/publications/barnews/june06-medved.htm>. Further, discovery represents 50 percent of litigation costs in the average case and up to 90 percent of litigation costs in cases where discovery is actively pursued. *Judicial Conference Adopts Rule Changes, Confronts Projected Budget Shortfalls*, THE THIRD BRANCH, (Admin. Office of the U.S. Courts), Oct. 1, 1999, <http://www.uscourts.gov/ttb/oct99ttb/october1999.html>.

8. REPORT, *supra* note 2, at C-18. "[T]he Committee has reached consensus on two points. First, electronically stored information has important differences from information recorded on paper. . . . Second, these differences are causing problems in discovery that rule amendments can hopefully address." *Id.*

9. 2006 U.S. ORDER, *supra* note 5. "Using an example from current technology, many large organizations routinely recycle hundreds of backup tapes every two or three weeks; placing a hold on the recycling of these tapes for even short periods can result in hundreds of thousands of dollars of expense." *Id.* See generally *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (2003) ("Zubulake I"). It was estimated that it would cost defendant, UBS War-

The cost of e-discovery was getting out of hand, and the Committee was afraid that parties were settling lawsuits, not based on the merits of the case, but rather to avoid the high costs relative to electronic data disclosure.<sup>10</sup>

After five years of research, the Committee found that there were three basic aspects of e-discovery that were most problematic: the voluminous nature in which electronic data is stored, the way it is preserved and the form in which it is produced.<sup>11</sup> A thorough understanding of these issues is necessary before one can gain insight on the Amendments themselves.

#### A. *The Storage of Electronic Data*

Perhaps the biggest difference between electronic documentation and paper documentation is the fact that electronic data can be stored in a much greater volume than hard-copy data. In fact, the sheer volume of electronic data, when compared with conventional paper documentation, can be staggering. Each gigabyte<sup>12</sup> averages approximately 500 thousand typewritten pages; therefore, a typical hard drive with a storage capacity of 100 gigabytes can store up to five million pages of plain text documentation.<sup>13</sup> When one applies this statistic to a large office with 100 computers, a discovery request for “all relevant documents” suddenly requires the responding party to comb through 500 million pages

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burg, LLC, approximately \$300,000 to comply with the court’s discovery order by producing electronic data contained on “backup tapes.” *Zubulake I*, 217 F.R.D. at 313.

10. REPORT, *supra* note 2, at C-19. “When the Committee deliberated on the liberal discovery rules . . . they raised the concern that expanded discovery would force settlements for reasons and on terms that related more to the costs of discovery than to the merits of the case, a concern raised frequently in the context of electronic discovery.” *Id.*

11. *Id.* at C-18. The three most problem-causing distinctions between traditional discovery and electronic discovery are “that electronically stored information is retained in exponentially greater volume than hard-copy documents; electronically stored information is dynamic, rather than static; and electronically stored information may be incomprehensible when separated from the system that created it.” *Id.*

12. A “byte” is a unit of memory on a computer, typically used to represent letters and numbers. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 157 (10th ed. 1988). A “gigabyte” is 1,073,741,824 bytes of memory. *Id.* at 491.

13. Applied Discovery, *E-Discovery in Depth — Tech Tips*, <http://www.lexisnexis.com/applieddiscovery/clientResources/techTips1.asp> (last visited Apr. 5, 2007). This figure is a rough estimate based on the fact that while a gigabyte can house approximately 677,963 pages of plain text documentation, files such as Microsoft Word documents require a greater storage capacity. *Id.* A gigabyte can only house 64,782 pages of documentation saved in Microsoft Word. *Id.* See also M. OVERLY & C. HOWELL, DOCUMENT RETENTION IN THE ELECTRONIC WORKPLACE 2-3 (Pike & Fischer 2001).

of text.<sup>14</sup> This is just the tip of the iceberg, however, as most large businesses also store data on backup disks.

Backup disks are popular because while they are small enough to fit in a briefcase, each one can hold up to 500 billion pages of plain text.<sup>15</sup> Compare this to paper document storage, which would require a large warehouse to store 500 billion pieces of paper. While convenient for storage purposes, however, backup disks pose a huge disadvantage to litigants as they are not designed to allow for the organized retrieval of data. Instead, backup disks must be restored onto a hard drive and re-formatted before they can be searched.<sup>16</sup>

This is where voluminous storage becomes problematic. Rule 26(b)(1),<sup>17</sup> for example, requires parties to disclose all relevant information likely "to lead to the discovery of admissible evidence" during the discovery phase of trial; yet it can be extremely costly and time consuming to sift through a backup disk containing 500 billion pages of text to find relevant data.<sup>18</sup> Producing electronic data from a backup tape typically takes five days and can cost hundreds of thousands of dollars.<sup>19</sup>

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14. 2006 U.S. ORDER, *supra* note 5. "Commonly cited current examples of such volume include the capacity of large organizations' computer networks to store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text, and to receive 250 to 300 million e-mail messages monthly." *Id.*

15. FEDERAL JUDICIARY CENTER, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

16. *Zubulake I*, LLC, 217 F.R.D. 309, 314 (2003). "Because each [backup] tape represents a snapshot of one server's hard drive in a given month, each server/month must be restored separately onto a hard drive." *Zubulake I*, 217 F.R.D. at 314.

17. Pre-Amendment Rule 26(b)(1) stated:

Parties may obtain discovery regarding *any* matter, not privileged, *that is relevant* to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

FED. R. CIV. P. 26(b)(1) (2005) (emphasis added).

18. *See supra* note 9. *See also* *Detweiler Bros., Inc. v. John Graham & Co.*, 412 F. Supp. 416, 422 (D. Wash. 1976) ("A request for discovery should be considered relevant if there is any possibility that information sought may be relevant to the subject matter of the action"); *Miller v. Doctor's Gen. Hosp.*, 76 F.R.D. 136, 138-39 (D. Okla. 1977) ("Discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action . . .").

19. *Zubulake I*, 217 F.R.D. at 313-14. While complicated, backup tape restoration can be broken down into a four-step procedure. *Id.* First, the relevant backup tape must be located. *Id.* Software is then used to transfer the data from the backup tape onto a hard drive. *Id.* A separate software program is used to extract the restored files and convert

To further aggravate the process, the restoration of voluminously stored data poses a substantial risk of the inadvertent waiver of both the attorney-client and work-product privileges.<sup>20</sup> After responsive data is gathered from backup tapes, the responding party must hire attorneys to review the files for privileged materials. While it is very expensive and time consuming to review hundreds of thousands of files in order to locate and review privileged data, such is necessary, as even the inadvertent disclosure of privileged documents may result in a waiver of the right to later assert any privileges.<sup>21</sup>

The leading authority for determining the duties and obligations of parties involved with electronic data storage and production is *Zubulake v. UBS Warburg, LLC*.<sup>22</sup> While *Zubulake I* involved a simple employment discrimination claim, much of the case centered on a single discovery dispute.<sup>23</sup> Prior to trial, plaintiff Laura Zubulake served a discovery request upon defendant UBS Warburg, LLC ("UBS") which called for the production of every e-mail sent and received from the accounts of five UBS employees during a two-year span.<sup>24</sup> UBS refused to produce the e-mails, arguing that the request was unduly costly and burden-

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them into a usable, native format. *Id.* The user is then able to use "keyword" searches to find any responsive data. *Zubulake I*, 217 F.R.D. at 313-14. In *Zubulake I*, experts estimated that it would cost the defendant \$300,000 to restore electronic data from 94 separate backup tapes. *Id.* at 313.

20. REPORT, *supra* note 2, at C-54. As the Committee stated:

The volume of electronically stored information responsive to discovery and the varying ways such information is stored and displayed make it more difficult to review for privilege than paper. The production of privileged material is a substantial risk and the costs and delay caused by privilege review are increasingly problematic.

*Id.*

21. *Transam. Computer Co. v. Int'l. Bus. Mach., Inc.*, 573 F.2d 646, 651 (9th Cir. 1978) ("a disclosure of confidential material constitutes a waiver of the attorney-client privilege only if it is voluntary and not compelled").

22. There were six decisions rendered by the United States District Court for the Southern District of New York in regards to *Zubulake v. UBS Warburg, LLC*. See *Zubulake I*, 217 F.R.D. at 309 (addressing "cost-shifting"); *Zubulake v. UBS Warburg, LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003) ("*Zubulake II*") (addressing the release of confidential deposition transcripts); *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*") (allocating backup tape restoration costs); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) ("*Zubulake IV*") (addressing the preservation of evidence, spoliation and sanctions); *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) ("*Zubulake V*") (granting sanctions and imposing an adverse inference instruction against UBS); and *Zubulake v. UBS Warburg, LLC*, 382 F. Supp. 2d 536 (S.D.N.Y. 2005) ("*Zubulake VI*") (ruling on the parties' motions in limine).

23. *Zubulake I*, 217 F.R.D. at 311-13.

24. *Id.* at 317.

some under Rule 26(b)(1)(iii).<sup>25</sup> Zubulake subsequently moved to compel production of the e-mails, and a discovery hearing date was set.<sup>26</sup> At the hearing, UBS supported its position by claiming that the requested e-mails were scattered throughout 94 separate backup disks and experts estimated it would cost approximately \$300,000 to restore, review and produce all relevant e-mails.<sup>27</sup>

Turning to the plain language of Rule 26(b)(1), the court found, as a general rule, that a responding party has a duty to disclose all information likely to lead to the discovery of relevant evidence, regardless of cost.<sup>28</sup> However, under Rule 26(b)(1)(iii),<sup>29</sup> the court has discretion to limit discovery that is "unduly burdensome or expensive."<sup>30</sup>

In ruling on Zubulake's motion to compel, the court first decided that only data stored in an "inaccessible" format will cause producing parties an undue burden or expense.<sup>31</sup> Data is inaccessible if it is "not readily usable and reasonably indexed" for searching purposes.<sup>32</sup> Because data stored on backup tapes must be restored onto a hard drive and reformatted before it can be searched, the court found that the data requested from UBS was "inaccessible."<sup>33</sup> Having determined an undue burden existed under Rule 26(b)(1)(iii), the court searched for the proper remedy.<sup>34</sup>

The court first looked to *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,<sup>35</sup> which held that federal courts have discretion to "shift the costs" of electronic data production from the producing party to the requesting party once an unduly costly or bur-

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25. *Id.* at 312-13. Pre-Amendment Rule 26(b)(1)(iii) stated:

[t]he frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that . . . (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

FED. R. CIV. P. 26(b)(1)(iii).

26. *Zubulake I*, 217 F.R.D. at 313-14.

27. *Id.* at 314.

28. *Id.* at 315-16.

29. *See supra* note 25.

30. *Zubulake I*, 217 F.R.D. at 316.

31. *Id.* "[W]hether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an *accessible* or *inaccessible* format." *Id.* at 318 (emphasis added).

32. *Id.* "[A] document is accessible if it is readily available in a usable format and reasonably indexed." *Id.*

33. *Id.*

34. *Id.* at 320-21.

35. 205 F.R.D. 421 (S.D.N.Y. 2005).

densome request is made.<sup>36</sup> Unhappy with the cost-shifting standard found in *Rowe*, however, the court fashioned a new seven-factor cost-shifting analysis, weighing the marginal utility of the requested data against both the cost of production and the ability of the responsive party to pay for production.<sup>37</sup> The seven factors were similar to those used in *Rowe*, but also incorporated the criteria listed in Rule 26(b)(1)(iii) for determining whether or not a request is unduly burdensome or costly.<sup>38</sup>

This was not a complete victory for UBS, however, as the court further held that UBS must first produce the requested data and assume the cost of production up front.<sup>39</sup> The court felt that a proper cost-shifting analysis could not be done until the court knew the costs of production; therefore, UBS was ordered to restore the backup tapes at its own expense and encouraged to later move for cost shifting.<sup>40</sup>

While this holding provided responding parties with a procedure for seeking reimbursement after unnecessary discovery costs are incurred, it did not prevent requesting parties from harassing opposing parties with intrusive requests. Not only was the responding party required to prove an "undue burden," it also had to pay the costs of production up front. After *Zubulake I*, parties were still free to submit unreasonable discovery requests, putting the burden on the responding party to shift costs.

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36. *Rowe*, 205 F.R.D. at 432-33.

37. *Zubulake I*, 217 F.R.D. at 321-23.

38. *Id.* at 323. The court stated:

Set forth below is a new seven-factor test based on the modifications to *Rowe* discussed in the preceding sections. (1) The extent to which the request is specifically tailored to discover relevant information; (2) The availability of such information from other sources; (3) The total cost of production, compared to the amount in controversy; (4) The total cost of production, compared to the resources available to each party; (5) The relative ability of each party to control costs and its incentive to do so; (6) The importance of the issues at stake in the litigation; and (7) The relative benefits to the parties of obtaining the information.

*Id.* at 322.

39. *Id.* at 324. "Requiring the responding party to restore and produce responsive documents from a small sample will inform the cost-shifting analysis laid out above." *Id.* See *id.* at 322.

40. *Id.* "When based on an actual sample, the marginal utility test will not be an exercise of speculation — there will be tangible evidence of what the backup tapes have to offer . . . [and] the time and cost required to restore the backup tapes." *Id.* at 325.



### B. *The Preservation of Electronic Data*

Document preservation was also a concern of the Committee while drafting the Amendments.<sup>41</sup> As electronically stored information is dynamic, rather than static, it can be deleted, overwritten or modified, intentionally or negligently, by action or inaction.<sup>42</sup> The ease with which electronic data can be modified or deleted is of obvious concern to litigants. Not only do businesses use computers to store important documents, a recent survey on electronic communications found that 70 percent of companies use e-mail for negotiating contracts and agreements.<sup>43</sup> It is extremely important that these electronic documents are not only saved, but preserved in their original manner, as subsequent litigation may necessitate their production.

The willful or negligent loss of relevant evidence during trial or in anticipation of litigation is known as spoliation, and carries with it severe penal and civil penalties.<sup>44</sup> In *Zubulake VI*, for example, the jury found that UBS willfully deleted the e-mails that the court determined were relevant in *Zubulake I*.<sup>45</sup> The jury subsequently awarded *Zubulake* \$29.3 million in damages (\$9.1 million in compensatory damages and \$20.2 million in punitive dam-

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41. REPORT, *supra* note 2, at C-18.

42. DAVID G. RIES, E-DISCOVERY — THE BASICS 5 (2006).

43. AIIM and Kahn Consulting, *Struggle Continues Between How Organizations Use Electronic Communications Technology and How They Are Managed*, Mar. 2, 2005, <http://www.aiim.org/article-pr.asp?ID=29428>.

44. Spoliation is “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Zubulake IV*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). *Zubulake V* gave litigants the appropriate standard:

First, counsel must issue a “litigation hold” at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees. Second, counsel should communicate directly with the “key players” in the litigation, i.e., the people identified in a party’s initial disclosure and any subsequent supplementation thereto. Because these “key players” are the “employees likely to have relevant information,” it is particularly important that the preservation duty be communicated early to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place. Finally counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.

*Zubulake V*, 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004). A “litigation hold” is what courts commonly refer to as the suspension of a routine document retention/destruction policy at the outset of litigation. *Zubulake IV*, 220 F.R.D. at 218.

45. *Zubulake VI*, 382 F. Supp. 2d 536, 547 (S.D.N.Y. 2005).

ages).<sup>46</sup> This award, however, pales in comparison to the one given in *Coleman Holdings, Inc. v. Morgan Stanley & Co., Inc.*<sup>47</sup> In *Coleman*, the jury awarded Coleman Holdings \$1.45 billion in damages (\$604 million in compensatory damages and \$850 million in punitive damages) after finding that Morgan Stanley failed to search approximately 1400 backup tapes for e-mails, then filed a false certificate with the court claiming that the search had been made.<sup>48</sup>

Punitive damages are not the only potential repercussion, as intentional spoliation may lead to jail time as well. Following the Enron scandal, Arthur Anderson was convicted of obstruction of justice due to its electronic document retention policy, which the government claimed encouraged the destruction of relevant electronic data.<sup>49</sup> Members of the board of directors were sentenced to serve time in prison, and their convictions were subsequently affirmed by the Fifth Circuit.<sup>50</sup>

The federal government has made it clear, through both legislative and judicial action, that the intentional deletion or manipulation of electronic evidence is strictly prohibited.<sup>51</sup> Circuits are split, however, as to whether or not negligent spoliation is sanctionable.<sup>52</sup> Negligent, or “good faith,” spoliation is the unknowing deletion of relevant evidence by a computer program during or in anticipation of litigation.<sup>53</sup>

Because it is fiscally and administratively impossible for large businesses to preserve every piece of electronic data for an infinite period of time, large businesses have programs that recycle stale data after a certain period.<sup>54</sup> These programs operate automatically, deleting antiquated files when newer files require storage.<sup>55</sup>

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46. *Zubulake VI*, 382 F. Supp. 2d at 547.

47. No. 502003CA00504XXOCAI, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005).

48. *Coleman*, 2005 WL 679071, at \*7-8.

49. *United States v. Arthur Anderson, LLP*, 374 F.3d 281 (5th Cir. 2004), *rev'd* 544 U.S. 696 (2005).

50. *Arthur Anderson*, 374 F.3d at 284. The convictions were later overturned by the United States Supreme Court on procedural grounds. *See United States v. Arthur Anderson, LLP*, 544 U.S. 696 (2005).

51. Rule 37(b) permits the court to impose sanctions on parties who fail to fully disclose relevant evidence that is requested of them. *See generally* FED. R. CIV. P. 37(b) (2005).

52. *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101 (2nd Cir. 2002) (sanctions “may be imposed where a party has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence”); *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004) (“under . . . federal law there must be a finding of intentional destruction indicating a desire to suppress the truth”).

53. REPORT, *supra* note 2, at C-83.

54. *Id.*

55. *Id.*

Problems arise when electronic data, deleted during or in anticipation of litigation, comes into issue later on during trial.<sup>56</sup>

Currently, federal courts are unable to give litigants a consistent and reliable solution to this problem; some circuit courts penalize parties for good faith spoliation, while others decline to do so.<sup>57</sup> Businesses, therefore, do not know what information needs to be preserved once litigation is reasonably anticipated. Ideally, companies would prefer to allow their data recycling programs to continue unfettered, as it can be difficult and costly for entities to reprogram their systems to allow for the preservation of all potentially relevant electronic data.<sup>58</sup> However, with millions, if not billions, of dollars in sanctions at stake, companies need a clearer annunciation of the court's discretion in imposing sanctions for good faith spoliation.

### C. *Form of Production*

The final concern of the Committee in drafting the Amendments was the form in which electronic data is produced during discovery.<sup>59</sup> Because electronic data may be incomplete or incomprehensible when it is separated from the system on which it was created, the form in which electronic data is produced is an important issue for litigants.

All electronic documents inherently contain "metadata," or "data about data."<sup>60</sup> Metadata is information about a document that is contained within the system and does not appear on a paper printout.<sup>61</sup> Metadata may include facts ranging from when and by whom a file was last edited, to the calculations used to derive the statistics found on a spreadsheet.<sup>62</sup> Metadata is an important consideration for both the producing and requesting party when deciding on the form of production because there may be privileged and/or relevant information within a file's metadata.

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56. Both counsel and client alike have an absolute duty to "issue a litigation hold at the outset of litigation or whenever litigation is reasonably anticipated." *Zubulake V*, 229 F.R.D. 422, 433 (S.D.N.Y. 2004).

57. *See supra* note 52.

58. "[A]mended Rule [37(f)] recognizes that suspending or interrupting [computer recycling programs] . . . can be prohibitively expensive and burdensome." *REPORT*, *supra* note 2, at C-83.

59. *Id.* at C-18.

60. *RIES*, *supra* note 42, at 5.

61. *Id.*

62. *Id.*

In *Williams v. Sprint/United Management Co.*,<sup>63</sup> the court set forth what is now the current standard for the production of metadata.<sup>64</sup> There, plaintiff Shirley Williams requested the production of certain spreadsheets during the course of discovery, to which defendant Sprint/United Management, Co. ("Sprint") responded by handing over paper printouts of said spreadsheets.<sup>65</sup> Williams subsequently demanded the production of the spreadsheets in an electronic format so that she may have access to the calculations giving rise to the statistics on the printout.<sup>66</sup> Sprint refused to provide an electronic version.<sup>67</sup>

In deciding the issue, the court focused on the meaning of the term "document," as found within Rule 34,<sup>68</sup> and held that electronic documents include all information "ordinarily viewable by the user" when the file is in electronic format.<sup>69</sup> Because the spreadsheet calculations were ordinarily viewable by the computer system's user, the court ordered Sprint to produce the spreadsheets in an electronic format, such as a floppy disk.<sup>70</sup>

While it is currently clear that all metadata ordinarily viewable by the user of the electronic file is subject to the same standards of discovery as the electronic file itself, many questions surrounding metadata still exist. For example, may a party request a specific form of production? Moreover, what is a responsive party's duty to answer such a request?

### III. THE 2006 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

With these three overarching concerns in mind,<sup>71</sup> the Committee drafted the 2006 Amendments to the Federal Rules of Civil Procedure.<sup>72</sup> While the changes are significant, the Amendments

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63. 230 F.R.D. 640 (D. Kan. 2005).

64. *Williams*, 230 F.R.D. at 650-52.

65. *Id.* at 642.

66. *Id.* at 643.

67. *Id.* at 644.

68. Pre-Amendment Rule 34 stated that "Any party may serve on any other party a request . . . to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents . . ." FED. R. CIV. P. 34(a) (2005).

69. *Williams*, 230 F.R.D. at 643-45.

70. *Id.* at 657.

71. The three main concerns of the Committee in drafting the Amendments were electronic data storage, preservation and production. See *supra* note 11.

72. REPORT, *supra* note 2, at C-18.

can be broken down into five major proposals.<sup>73</sup> Amended Rules 16(b), 26(a) and 26(f) ("Proposal One") encourage both the litigants and the judge to address all e-discovery issues before discovery begins.<sup>74</sup> Amended Rule 26(b)(2) ("Proposal Two") provides responding parties with a procedure for objecting to unreasonable discovery requests.<sup>75</sup> Amended Rule 26(b)(5) ("Proposal Three") confers upon responding parties the ability to assert privilege after the inadvertent production of privileged materials.<sup>76</sup> Amended Rules 33(d), 34(a) and 34(b) ("Proposal Four") provide parties with a procedure for requesting and objecting to the form of production of electronic data.<sup>77</sup> Finally, amended Rule 37(f) ("Proposal Five") makes it clear that the spoliation of electronic data in good faith is not sanctionable under the Rules.<sup>78</sup>

#### A. *Proposal One: Early Planning*

In order to encourage both the court and the litigants to attend to e-discovery issues early in the litigation, amendments to Rules 16 and 26 invite the judge to address e-discovery in the scheduling order, and encourage parties to discuss potential e-discovery problems at the pre-trial conference.<sup>79</sup> The goals of the Committee in encouraging such discussions were to persuade the parties to agree on the form of production, develop a plan for preserving electronic data throughout the course of litigation and to properly assert any privileges — all before discovery commences.<sup>80</sup>

Rule 16(b)<sup>81</sup> was amended to give the judge significant discretion in handling e-discovery issues early in the litigation should he or she believe that e-discovery will become problematic later on.<sup>82</sup> The judge is given the power to require the parties to develop a

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73. There are actually six proposals; however, the sixth and final proposal merely provides for the subpoena of electronic data and does not necessitate analysis. See REPORT, *supra* note 2, at C-91 to 108.

74. *Id.* at C-21 to 41.

75. *Id.* at C-42 to 53.

76. *Id.* at C-54 to 63.

77. *Id.* at C-64 to 82.

78. REPORT, *supra* note 2, at C-83 to 90.

79. *Id.* at C-23.

80. *Id.*

81. Amended Rule 16(b) additionally states "[t]he scheduling order also may include . . . (5) provisions for disclosure or discovery of electronically stored information; (6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production . . . ." *Id.* at C-26 to 27.

82. *Id.* at C-27 to 28. "The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur." *Id.*

discovery plan and to even set up a timetable for disclosure.<sup>83</sup> The Committee believed that the court's involvement early in the litigation will help prevent difficulties that may later arise.<sup>84</sup> Rule 26(f)<sup>85</sup> was amended to direct the parties to discuss any "issues relating to [the] disclosure or discovery of electronically stored information" during the discovery planning conference.<sup>86</sup> The amendment specifically directs the parties to discuss and resolve any issues relating to form of production, preservation of electronic evidence and assertion of privilege at the pre-trial conference.<sup>87</sup>

*B. Proposal Two: The Unreasonable Use of Discovery*

The Committee's second proposal addresses the issuance of unreasonable discovery requests.<sup>88</sup> Amended Rule 26(b)(2)<sup>89</sup> specifically allows a party to object to a discovery request on the basis that it seeks electronic data that is "not reasonably accessible because of undue burden or cost."<sup>90</sup> After the responding party specifically identifies such inaccessible data, the opposing party may move to compel production of the data with a showing of good cause.<sup>91</sup> Further, the judge may compel production *sua sponte* if

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83. *Id.* at C-26 to 27.

84. REPORT, *supra* note 2, at C-27.

85. Amended Rule 26(f) states that the parties' discovery plans must additionally include:

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced; (4) any issues relating to claims of privilege or of protection of trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order . . . .

*Id.*

86. *Id.* at C-33.

87. *Id.* at C-24.

88. *Id.* at C-42.

89. Amended Rule 26(b)(2)(B) states:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

*Id.* at C-45 to 46.

90. *Id.* at C-42.

91. REPORT, *supra* note 2, at C-43.

he or she feels good cause exists.<sup>92</sup> Under the amended Rule, good cause exists if the burdens and costs to be incurred in production can be justified under the circumstances of the case.<sup>93</sup> The amended Rule also gives the judge discretion to specify conditions of the forced production.<sup>94</sup>

The purpose of the amendment was to allow parties to incur the lowest costs possible while still producing responsive material.<sup>95</sup> The Committee felt that, in most cases, the discovery obtained from the accessible sources will be sufficient to meet the needs of the requesting party.<sup>96</sup> However, if it is not, the Rule allows the requesting party to compel production, subject to judicial supervision.<sup>97</sup> The amendment was specifically tailored to allow responding parties to avoid the exorbitant costs associated with the production of data found on unsearchable mediums such as backup tapes.<sup>98</sup>

### C. *Proposal Three: The Inadvertent Production of Privileged Data*

Proposal Three addresses the inadvertent production of privileged materials and provides parties with a procedure to seek the return of unintentionally disseminated documents.<sup>99</sup> Amended Rule 26(b)(5) first requires a party asserting a claim of privilege to give notice to the receiving party, stating the specific grounds upon which the privilege is based.<sup>100</sup> The receiving party is then

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92. *Id.* "A finding that the responding party has shown that a source of information is not reasonably accessible does not preclude discovery; the court may order discovery for good cause." *Id.*

93. *Id.* at C-49. The Committee lists seven factors for determining good cause that are very similar to the seven factors given by the court in *Zubulake I* for determining whether or not to shift costs:

Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

*Id.*

94. *Id.* at C-44.

95. *Id.* at C-42.

96. REPORT, *supra* note 2, at C-42.

97. *Id.* at C-43.

98. *Id.* at C-42.

99. *Id.* at C-54.

100. Amended Rule 26(b)(5)(B) additionally states:

given three options: to return, destroy or sequester the allegedly privileged materials.<sup>101</sup> If the receiving party chooses sequestration, the judge will determine the legitimacy of the privilege and rule accordingly.<sup>102</sup>

The amendment does not address the substantive question of whether or not a privilege has been waived or forfeited, but instead provides parties with a procedure to allow the assertion of privilege after mistaken production.<sup>103</sup> The Committee felt this amendment was necessary in the context of electronic data due to the massive amount of information that often must be disseminated.<sup>104</sup> Again, cost was an important consideration, as the amendment was intended to reduce the costs and delays associated with reviewing electronic documents by allowing responding parties the opportunity to assert any privileges after inadvertent dissemination.<sup>105</sup>

#### *D. Proposal Four: Form of Production*

Proposal Four specifically addresses the form in which electronically stored information must be presented when a party responds to an interrogatory or document request.<sup>106</sup> Amended Rule 33(d)<sup>107</sup> allows a party to respond to an electronic discovery re-

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If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

*Id.* at C-57 to 58.

101. REPORT, *supra* note 2, at C-54. "After receiving notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties until the claim is resolved." *Id.*

102. *Id.*

103. *Id.* at C-58. "[Amended] Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by production." *Id.*

104. *Id.* at C-54.

105. *Id.*

106. REPORT, *supra* note 2, at C-64.

107. Amended Rule 33(d) states:

Where the answer to an interrogatory may be derived or ascertained from the . . . electronically stored information [in its electronic form] . . . and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable



quest by simply providing access to the system in which the electronic data exists.<sup>108</sup> Such an option is conditioned, however, on the fact that retrieval of the requested data would be just as great of a burden on the requesting party as on the responding party.<sup>109</sup> Proposal Four is similar in kind to Proposal Two, as both allow a producing party to forego a burdensome routine when an effective and easier method exists to disseminate responsive information.<sup>110</sup>

Amended Rule 33(d) accompanies amended Rule 34(b).<sup>111</sup> Amended Rule 34(b)<sup>112</sup> permits the requesting party to designate the form or forms in which it prefers electronic data to be produced.<sup>113</sup> For example, a requesting party may wish to have all responsive e-mails produced in an electronic word processor format, or data compilations produced in an electronic spreadsheet format.

If the producing party objects to the requested form, it must provide a written response to the requesting party, stating the grounds for objection and the form in which it intends to produce the material.<sup>114</sup> If the requesting party is not satisfied by the form suggested by the producing party, the parties must confer to resolve the dispute.<sup>115</sup> If such conference is fruitless, the proper re-

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opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries.

*Id.* at C-68 to 69.

108. *Id.* at C-69.

109. *Id.*

110. *Id.* See also *id.* at C-42.

111. *Id.* at C-64.

112. Amended Rule 34(b) states:

The request may specify the form or forms in which electronically stored information is to be produced . . . . The party upon whom the request is served shall serve a written response within 30 days after the service of the request . . . . The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection . . . . If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use. . . . Unless the parties otherwise agree, or the court otherwise orders . . . (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and (iii) a party need not produce the same electronically stored information in more than one form.

*Id.* at C-71-73.

113. REPORT, *supra* note 2, at C-71 to 73.

114. *Id.* at C-76.

115. *Id.*

course for the requesting party is a motion to compel.<sup>116</sup> Amended Rule 34(b) further states that if form of production is not specified by a court order or party agreement, the responding party must produce electronic data in a form in which the data is ordinarily maintained or in a form which is reasonably usable.<sup>117</sup>

### *E. Proposal Five: Spoliation*

Proposal Five addresses a party's good faith failure to preserve relevant and/or responsive electronic documentation.<sup>118</sup> Under amended Rule 37(f),<sup>119</sup> a party will be insulated from spoliation liability for failing to preserve relevant electronic data if the data was lost during the routine,<sup>120</sup> good faith<sup>121</sup> maintenance of the system that encased the data.<sup>122</sup>

In drafting the amendment, the Committee recognized that computer systems are commonly designed to replace old data with new data in order to keep costs down and preserve storage space.<sup>123</sup> The purpose of this proposal was to therefore encourage the use of this practice in order to keep costs low for businesses. However, as the committee note that follows the amended Rule states, good faith requires a party to suspend or modify a computer system's routine operation in order to prevent the loss of information subject to preservation obligations.<sup>124</sup>

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116. *Id.* at 77.

117. *Id.*

118. REPORT, *supra* note 2, at C-83.

119. Amended Rule 37(f) states "[a]bsent exceptional circumstances, a court may not impose sanctions under [the Federal Rules of Civil Procedure] on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." *Id.* at C-86.

120. "The 'routine operation' of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents." *Id.* at C-87.

121. "The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve." *Id.*

122. REPORT, *supra* note 2, at C-83.

123. *Id.* In its report, the Committee stated:

It can be difficult to interrupt the routine operation of computer systems to isolate and preserve discrete parts of the information they overwrite, delete, or update on an ongoing basis, without creating problems for the larger system. It is unrealistic to expect parties to stop such routine operation of their computer systems as soon as they anticipate litigation.

*Id.*

124. *Id.* at C-87.

## IV. ANALYSIS

The goals of the Committee in drafting the Amendments were to increase the efficiency of e-discovery, “to reduce the costs of discovery, to increase the uniformity of practice, to and encourage the judiciary to participate more actively in case management.”<sup>125</sup> Only time will tell if these goals will be achieved by the Amendments; however, numerous scholars, bar associations, lawyers and judges have already commented on the Amendments and predicted their effectiveness.<sup>126</sup>

While Proposals One, Three and Four were warmly welcomed by the public and unanimously approved by the Committee, Proposals Two and Five have been highly criticized and failed to get unanimous Committee support.<sup>127</sup> Critics were wary of the fact that Proposals Two and Five did not have clear boundaries and will require judicial interpretation.<sup>128</sup> However, these critics may be jumping the gun, as it is the job of the Legislature to pass laws, and the job of the Judiciary to interpret and apply those laws. The public must have trust in the Judiciary to properly interpret and apply the Amendments, as the Committee has made its intent quite clear within the parameters of both the amended Rules themselves and the committee notes that further explain the Rules.

With some critics claiming that Proposal Two will create “satellite litigation,”<sup>129</sup> and others insisting it will cause “legal Chernobyl,”<sup>130</sup> Proposal Two has by far received the most criticism. The fear is that amended Rule 26(b)(2) creates more problems than it solves because *additional discovery* may be necessary for the court to determine whether or not information tagged as “not reasonably accessible” is, in fact, not reasonably accessible.<sup>131</sup>

While it is true that amended Rule 26(b)(2) requires the court to make a preliminary finding as to the actual accessibility of elec-

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125. *Id.* at C-21.

126. *Id.* at C-18. See *infra* notes 130 and 142.

127. REPORT, *supra* note 2, at C-21.

128. “At the very least, it appears that the contours of proposed [Rule] 37(f) will need to be determined judicially.” Medved, *supra* note 7, at 5. “[T]he interplay of amended Rules 26(b)(2) and 37(f) will enable corporate entities, in the normal course of business, to shift e-information from being reasonably accessible to inaccessible.” *Id.* at 4.

129. *Id.*

130. Ephraim Schwartz, *Document Management Systems Go to Court: New Federal Rules for 2006 Could Come Down Hard on IT*, INFOWORLD (December 27, 2005), available at [www.infoworld.com/article/05/12/27/01OPreality\\_1.html](http://www.infoworld.com/article/05/12/27/01OPreality_1.html).

131. Medved, *supra* note 7, at 4. See REPORT, *supra* note 2, at C-49.

tronic evidence tagged as “not reasonably accessible,” the inquiry is similar to the requisite cost-shifting analysis created by *Zubulake I*. In fact, amended Rule 26(b)(2) appears to codify *Zubulake I*, including seven factors to determine “good cause” which are similar to those used in *Zubulake I* for determining “cost-shifting.”<sup>132</sup> The only change that accompanies Proposal Two is the fact that responding parties are no longer required to incur unreasonable costs up front, so long as they can state/make a prima facie case showing that the evidence sought is “not reasonably accessible.”<sup>133</sup>

Proposal Two does not create additional, or “satellite,” litigation, but simply *moves forward* the litigation regarding the production of inaccessible data so the producing party does not have to “front” the costs of production.<sup>134</sup> Under amended Rule 26(b)(2), the producing party may mark data as “inaccessible” at the outset of the litigation.<sup>135</sup> The requesting party must then either show “good cause” to compel production, or seek the information from other sources.<sup>136</sup> The “good cause” analysis is intended to replace the seven-factor “cost-shifting” analysis founded in *Zubulake I*, with an added emphasis on the availability of the requested information from more accessible sources.<sup>137</sup>

Proposal Two does not create additional litigation by introducing a “good cause” analysis, as the current method requires a similar “cost-shifting” analysis.<sup>138</sup> Further, the Committee’s goals of reducing the costs of discovery and making e-discovery more efficient are advanced by the proposal. Litigants can no longer harass responsive parties with unreasonable discovery requests, and responsive parties no longer have to front the costs of unreasonable discovery requests.

Proposal Five has also received misplaced criticism.<sup>139</sup> It has been accused of creating an ineffective rule,<sup>140</sup> lending additional

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132. See *supra* note 38 for the *Zubulake* cost-shifting test and *supra* note 93 for the Committee’s “good cause” test.

133. REPORT, *supra* note 2, at C-49. See *Zubulake I*, 217 F.R.D. 309, 324 (2003).

134. See REPORT, *supra* note 2, at C-49.

135. *Id.* at C-46.

136. *Id.* at C-49.

137. *Id.* at C-44. “But in an improvement over the present practice, in which parties simply do not produce inaccessible electronically stored information, the amendment requires the responding party to identify the sources of information that were not searched, clarifying and focusing the issue for the requesting party.” *Id.*

138. *Zubulake I*, 217 F.R.D. at 324.

139. REPORT, *supra* note 2, at C-84.

140. Medved, *supra* note 7, at 5. Amended Rule 37(f) “does not prevent a court from exercising its inherent power to sanction a party.” *Id.* (citing *Glover v. BIC Corp.*, 6 F.3d

opportunities for discovery disputes<sup>141</sup> and even violating the Rules Enabling Act.<sup>142</sup>

Critics first accuse Proposal Five of being ineffective, claiming that while judges will no longer have authority under the Rules to sanction good faith spoliation, judges will still have the inherent power to sanction such conduct.<sup>143</sup> Though judges have the inherent power to sanction parties, judges do not typically sanction conduct done in good faith, as sanctions are intended to punish parties for conduct done in bad faith.<sup>144</sup> Amended Rule 37(f) is clear that it is only meant to insulate parties from liability for "good faith" spoliation.<sup>145</sup> Such criticism is therefore meritless.

Next, Proposal Five has been criticized for lending an opportunity for additional discovery disputes, as parties will now be encouraged to litigate whether or not the spoliation in question occurred in "good faith."<sup>146</sup> This argument is also without merit/reason. Though the court will now be forced to hear argument on whether or not the spoliation in issue occurred in good faith, the court need not hear argument on whether or not good faith spoliation is actually sanctionable.<sup>147</sup> Amended Rule 37(f) settles the law in this often-disputed area by making it clear that the negligent deletion of relevant electronic data during or in anticipation of litigation is a non-sanctionable offense.<sup>148</sup>

Finally, Proposal Five has been accused of violating the Rules Enabling Act ("REA"), as it allegedly creates an affirmative duty

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1318, 1329 (9th Cir. 1993) ("A federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence.")).

141. Medved, *supra* note 7, at 5. Amended Rule 37(f) "appears to provide fertile grounds for additional discovery disputes." *Id.*

142. Nathan D. Larsen, *Evaluating the Proposed Changes to Federal Rules of Civil Procedure 37: Spoliation, Routine Operation and the Rules Enabling Act*, 4 NW. J. OF TECH. & PROP. 212, ¶ 22 (2006). The Rules Enabling Act is promulgated under 28 U.S.C. § 2072 (1982).

143. *See Glover*, 6 F.3d at 1329.

144. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991). "A court must, of course, exercise caution in invoking its inherent power [to sanction], and it must comply with the mandates of *due process* . . . in determining that the requisite *bad faith* exists." *Chambers*, 501 U.S. at 50-51 (emphasis added).

145. "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide such electronically stored information lost as a result of routine, *good-faith* operation of an electronic information system." REPORT, *supra* note 2, at C-89-90 (emphasis added).

146. Medved, *supra* note 7, at 5.

147. *See* REPORT, *supra* note 2, at C-83.

148. *Id.*

for companies to retain data.<sup>149</sup> The REA states that no federal rule “shall abridge, enlarge or modify any substantive right,” yet some commentators are cautious that once the judiciary defines “routine operation,” companies will have an affirmative, *substantive duty* to preserve data that is *not* deleted in routine operation of their data recycling programs.<sup>150</sup>

These skeptics are reading into the Proposal a positive duty that does not exist. The plain language of amended Rule 37(f) merely states that the court may not sanction good-faith spoliation that occurred during the routine operation of a data-recycling program.<sup>151</sup> The Proposal does not require companies to preserve data, but merely eliminates the power of the court to sanction spoliation that occurred during routine operation. To say that Proposal Five creates an affirmative duty is to say that every Rule creates a positive duty.

It would be akin to claiming that Rule 13(a)<sup>152</sup> bestows upon defendants a positive duty to assert all counterclaims which arise out of the same transaction or occurrence that are the subject of the plaintiff's complaint. Surely, it is beneficial for the defendant to assert all compulsory counterclaims in his response, as failure to do so constitutes a waiver of the right to bring them.<sup>153</sup> But the defendant does not have a *positive duty* to do so. He may simply choose not to bring them and forever waive his right.

Similarly, amended Rule 37(f) does not require companies to preserve all data that is not deleted during the routine operation of their recycling program.<sup>154</sup> The amended Rule makes it beneficial for a company to preserve electronic data that is not routinely deleted by allowing such spoliation to be sanctioned; however, it does not bestow upon companies a duty to preserve. Even if “routine operation” is given a definite interpretation, companies will not have a *duty* to preserve data that is not deleted in the routine operation of their data recycling programs; such preservation would simply be beneficial.

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149. Larsen, *supra* note 142. “Any attempt to define the affirmative duties of companies to retain electronic information should be left to legislatures or to common law rulemaking. Essentially, commentators should not ask for what they cannot get in a Federal Rule: substantive rule making.” *Id.*

150. *Id.* See 28 U.S.C. § 2072 (1988).

151. REPORT, *supra* note 2, at C-86.

152. Rule 13(a) states “[a] pleading *shall* state as a counterclaim any claim which . . . arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.” FED. R. CIV. P. 13(a) (emphasis added).

153. *Id.*

154. See REPORT, *supra* note 2, at C-86.

While Proposals Two and Five have received much debate, both are positive solutions to growing problems. Settlements based on the costs of discovery, instead of the merits of the suit, go against the very grain of our judicial system. And with e-discovery leaving companies with costs ranging between six and seven figures, one does not need a law degree to understand that the current system provides plaintiffs with an opportunity to leverage hefty settlements with intrusive discovery requests. As Proposal Two will cut down on the cost of production, and Proposal Five will cut down on the cost of preservation, without any major side effects, both should be looked at as a huge success.

While Proposals Two and Five are making the headlines, Proposals One, Three, and Four also deserve an analytical eye. Proposal One has been "consistently applauded" by commentators,<sup>155</sup> and deservedly so. The Proposal squarely addresses the Committee's goal of improving the efficiency of e-discovery by requiring parties to put in writing their plans for electronic data production, preservation and privilege before discovery even begins.<sup>156</sup> The Proposal also gives judges the discretion to step in if he or she feels that the parties have not made the appropriate accommodations.<sup>157</sup> Proposal One will not only solve many problems before they arise by encouraging open communication, the Proposal will cut down on the costs and burdens associated with e-discovery by forcing parties to plan and prepare for any foreseeable e-discovery issues.

Proposal Three should also be viewed in a positive light, as it serves as an equitable solution to a growing problem. Surely, a party should not be able to benefit from the inevitable mistake of another.<sup>158</sup> Therefore, it only makes sense to allow litigants a chance to assert privilege after the inadvertent disclosure of privileged documentation.<sup>159</sup> The Proposal is further successful as it allows parties to cut down on burdensome and time-consuming document review by reducing the marginal benefit associated with thorough document appraisal.<sup>160</sup>

Proposal Four should also be considered a great achievement. By not only allowing parties to request the form of production, but

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155. *Id.* at C-23.

156. *Id.*

157. *Id.*

158. The Committee refers to inadvertent disclosures of privileged documentation as "inevitable blunders." *Id.* at C-54.

159. *See id.* at C-54 to 55.

160. *See* REPORT, *supra* note 2, at C-55 to 56.

by providing a default form of electronic data production, Proposal Four should dramatically cut down on the amount of litigation associated with electronic data production.<sup>161</sup> Further, when Proposal Four is combined with the provision of Proposal One that allows parties to agree on form before discovery begins, it appears that the Committee may have successfully put to rest all litigation currently associated with form of production.

## V. CONCLUSION

Whether a private practitioner or a mega-firm corporate lawyer, every attorney must become familiar with the 2006 Amendments to the Federal Rules of Civil Procedure. E-mail is changing the way trials are won and lost, and those in the legal profession must be aware of these changes in order to avoid antiquation. An e-mail may be the center of any legal dispute. It can show a decedent's intent to modify his will, constitute the exclusive evidence of an alleged contract, or accept an offer to merge two, billion-dollar corporations. The 2006 Amendments provide litigants with codified procedures for preserving, requesting and producing such electronic evidence. As litigants communicate and store information by electronic means, both counsel and client alike must have a thorough understanding of these procedures.

*Salvatore Joseph Bauccio*

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161. See *id.* at C-64 to 68.



